

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

MARTHA Y. ESPARZA

v.

COMMONWEALTH EDISON COMPANY

Docket No. 10-0742

WITHDRAWAL OF MOTION FOR RECONSIDERATION
AND
PETITION FOR INTERLOCUTORY REVIEW

NOW COMES Martha Y. Esparza (“Plaintiff”), by and through her attorney, Ian D. Brodsky, and withdraws her Motion for Reconsideration filed January 5, 2011, and petitions the Illinois Commerce Commission (“Commission”) instant for interlocutory review of the Administrative Law Judge’s Ruling entered January 3, 2011, and in support thereof states as follows:

A. PROCEDURAL HISTORY

1. Plaintiff filed her Verified Complaint on December 28, 2010, alleging erroneous billing, unjust and unreasonable charges, and unauthorized billing practices.
2. On December 29, 2010, an Administrative Law Judge was assigned.
3. Also on December 29, 2010, Plaintiff filed a motion for substitution of judge as a matter of right.
4. The Administrative Law Judge issued a Ruling dated January 3, 2011, denying the motion for substitution of judge as a matter of right (the “Ruling”).
5. On January 5, 2011, Plaintiff filed a Motion for Reconsideration of the Ruling (the “MFR”).

6. The MFR stated that the Ruling was ambiguous as to the basis for the denying the substitution of judge (MFR, ¶ 4), and furthermore that neither of the two apparent interpretations is consistent with Illinois law (MFR, ¶¶ 5-7).

7. As of the close of business on Friday, February 11, 2011, no ruling had been made on the MFR.

8. No substantive rulings have been made in this matter.

9. 83 Ill. Admin. Code 200.510 (“Code Part 200.510”) provides that “the Commission ... may review denials of such motions under Section 200.520.” 83 Ill. Admin. Code 200.520 (“Code Part 200.520”) provides that “failure to seek immediate review shall not operate as a waiver of any objection to such ruling.” Code Part 200.520 allows that such review may be sought beyond 21 days for good cause shown. (Id.) Good cause exists because Plaintiff filed her MFR two (2) days after the Ruling for which review is sought, and the Administrative Law Judge has failed or refused to rule upon the MFR for more than 21 days.

B. BASIS OF REVIEW

- 1) The Ruling is ambiguous.
- 2) The Ruling is inconsistent with Illinois law, regardless of the ambiguity.
- 3) The failure or refusal of the Administrative Law Judge to rule upon the Motion for Reconsideration in a timely manner is prejudicial to the Plaintiff.

C. ARGUMENT

10. The Ruling denying Plaintiff’s motion for substitution of judge stated that the motion “fails to comply with the requirement in the Commission’s Rules of Practice (Section 200.510) that a motion for disqualification of an Administrative Law Judge must contain an affidavit setting forth the alleged grounds for disqualification.”

11. The motion requested that substitution be granted as a matter of right, citing 735 ILCS 5/2-1001(a)(2) and 83 Ill. Admin. Code 200.510 (“Code Part 200.510”). (Exhibit A.) Attached to said motion was Plaintiff’s sworn certification that she requests a substitution of judge for the reasons set forth in the motion. (Exhibit A, at 3.)

12. The Ruling is ambiguous as to whether the denial of the motion was based upon the form of affidavit, or because substitution as a matter of right was refused as grounds for disqualification. (See Exhibit B.)

13. If the Ruling was based upon the form of the affidavit, Illinois courts have held that such a certification is “the equivalent of an affidavit.” *Hoxha v. LaSalle Nat. Bank*, 365 Ill. App.3d 80, 85, 847 N.E.2d 725, 729 (1st D. 2006) (regarding a pleading); *Griffin v. Universal Casualty Co.*, 274 Ill.App.3d 1056, 1063, 654 N.E.2d 694, 699 (1st D. 1995) (regarding a motion).

14. If the Ruling was because substitution as a matter of right was not accepted as grounds for disqualification, Illinois courts have held that there is no discretion to deny such a request. (See *In re Estate of Gagliardo*, 391 Ill.App.3d 343, 346-47, 908 N.E.2d 1056, 1059 (1st D. 2009); *Beahringer v. Hardee’s Food Sys., Inc.*, 282 Ill. App.3d 600, 601, 668 N.E.2d 614, 615 (5th D. 1996).)

15. Code Part 200.510 states: “Whenever any party believes a Hearing Examiner *for any reason* should be disqualified ... such party may file a motion to disqualify the Hearing Examiner, setting forth by affidavit the alleged grounds for disqualification.” (83 Ill. Admin. Code 200.510(b) (emphasis added).)

16. While Code Part 200.510 and the Ruling state that the filing must set forth “the alleged grounds,” Code Part 200.510 does not prescribe any minimum as to what those grounds

must be, stating instead that such motion may be brought “for any reason.” The silence of Code Part 200.510 as to minimum grounds is filled by 735 ILCS 5/1-108, which states:

Civil Practice Law applies. ... (b) In proceedings in which the procedure is regulated by statutes other than those contained in this Act, such other statutes control to the extent to which they regulate procedure but Article II of this Act applies to matters of procedure not regulated by such other statutes.

(735 ILCS 5/1-108(b).) This proceeding is regulated by the Public Utilities Act and the administrative rules promulgated thereunder, neither of which provide guidance as to the grounds for substitution. Accordingly, 735 ILCS 5/1-108(b) applies, and in the absence of a contrary statute or rule, the provisions of the Civil Practice Act also apply. Accordingly, a motion for substitution that is sufficient pursuant to Section 2-1001(a)(2) of the Civil Practice Act (735 ILCS 5/2-1001(a)(2)) also sufficiently states grounds under Code Part 200.510. (*Cf. Bloom Tp. High School v. Ill. Commerce Com’n*, 309 Ill. App.3d 163, 177, 722 N.E.2d 676, 687 (1st D. 1999) (“Granting summary disposition in an administrative proceeding is comparable to granting summary judgment under section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005)”)).¹

17. Finally, the failure or refusal of the Administrative Law Judge to rule upon the Motion for Reconsideration in a timely manner is both prejudicial to the Plaintiff and error in itself. Code Part 200.510 gives the Administrative Law Judge fourteen (14) days after the filing

¹ Of course, Section 10-101 of the Public Utilities Act references the Illinois Administrative Procedure Act as guiding proceedings before the Commission. (See 220 ILCS 5/10-101.) That does not, however, impact the applicability of Section 1-108 of the Civil Practice Act in this instance. The relevant provision of the Illinois Administrative Procedure Act is Section 10-30 (“Disqualification of administrative law judge”), which merely states: “The agency shall provide by rule for disqualification of an administrative law judge for bias or conflict of interest.” (5 ILCS 100/10-30(b).) It does not limit a change of judge to those two bases; rather, it instructs the Commission to make a rule that covers at least those two situations. The Commission adopted a rule, however, that goes far beyond those two narrow bases, stating instead: “Whenever any party believes a Hearing Examiner *for any reason* should be disqualified ... such party may file a motion” (83 Ill. Admin. Code 200.510(b) (emphasis added).) By adopting such a permissive rule (and indeed, by inviting such a motion “for any reason”), the Commission not only opened the door to motions for substitution that do not explicitly allege bias or conflict of interest, it did so in the absence of any procedural guidance conveyed by statute or rule – except by applying those stated in the Civil Practice Act pursuant to 735 ILCS 5/1-108.

of the motion to enter a written ruling. Forty (40) days have elapsed since the Motion for Reconsideration on the same subject matter was filed. This case is subject to a one-year deadline pursuant to 220 ILCS 5/10-108. Said deadline will have greater impact upon the Plaintiff, as the party with comparably limited means.

D. CONCLUSION

18. Plaintiff requests for the foregoing reasons that the Ruling entered January 3, 2011, denying Plaintiff's motion for substitution as a matter of right be reversed, and that the matter be transferred instant to the Chief Administrative Law Judge for reassignment.

19. Notwithstanding the instant Petition for Interlocutory Review (and as previously stated in her Motion for Reconsideration), Plaintiff expressly reserves the right to file a motion for substitution of judge for cause, with such cause that pre-dates the filing of the Complaint.

WHEREFORE, the Plaintiff prays that the Illinois Commerce Commission reverse the Administrative Law Judge's Ruling entered January 3, 2011, and transfer the matter to the Chief Administrative Law Judge for reassignment, and confer such further and additional relief as it deems just.

MARTHA Y. ESPARZA

/s/ Ian D. Brodsky,
Her Attorney

Law Offices of Ian D. Brodsky, LLC
29 South LaSalle, Suite 945
Chicago, IL 60603
312-278-1187